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25 *List of counsel continued on the second page*

26 **UNITED STATES DISTRICT COURT**

27 **CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION**

28 **CREATIVE INTEGRATED
SYSTEMS, INC.,**

1 Plaintiff,

2 v.

3 **NINTENDO OF AMERICA INC.;**
4 **NINTENDO CO., LTD.;**
5 **MACRONIX AMERICA, INC.; and**
6 **MACRONIX INTERNATIONAL**
7 **CO., LTD.,**

8 **Defendants.**

9 **Case No. 2:10-CV-2735 PA (VBK)**

10 **PLAINTIFF'S MOTION FOR A JURY
INSTRUCTION REGARDING THE
IRRELEVANCE OF DEFENDANTS'
ASSERTIONS IN CLOSING
ARGUMENT REGARDING
PLAINTIFF'S ALLEGED DELAY**

11 Trial: March 4, 2014

12 Courtroom: 15

13 Judge: Hon. Percy Anderson

1 Plaintiff Creative Integrated Systems, Inc. (“Plaintiff” or “CIS”) respectfully
2 requests that the Jury be properly instructed regarding the relevance of Defendants’
3 assertions in closing argument that Plaintiff’s alleged delay in filing this lawsuit should
4 have a determinative impact on the issues that the Jury has been asked to decide.

5 Counsel for Defendants presented a lengthy closing argument that, at its heart,
6 was focused on Defendants’ allegation that Plaintiff improperly delayed in filing this
7 lawsuit. This allegation is primarily—if not exclusively—relevant to the issues of
8 laches and estoppel, which the Jury has *not* been asked to decide and which instead will
9 be decided by the Court. By interjecting these irrelevant matters into their closing
10 argument, Defendants invited the Jury to commit legal error by considering Plaintiff’s
11 alleged delay in filing suit as a factor in the issues that the Jury has been asked to
12 decide. Among other things:

- 13 • The Jury has been asked to compare the ‘497 patent to written prior art
14 references as part of Defendants’ anticipation and derivation claims. The
15 writings show what they show; any alleged delay in filing suit has nothing
16 to do with the invalidity arguments presented to the Jury.¹
- 17 • The Jury has been asked to decide infringement. Infringement is
18 determined by comparing the claims of the ‘497 patent to the memory array
19 designs produced by the Defendants relating to the accused ROM chips.
20 Delay is irrelevant to infringement.
- 21 • The Jury has been asked whether Mr. Oishi was improperly omitted as an
22 inventor of the ‘497 patent. Mr. Oishi has said he does not claim to be an
23 inventor. Delay has nothing to do with whether Mr. Oishi was an inventor
24 or not.
- 25 • The Jury has been asked to decide patent marking. Delay has nothing to do
26 with patent marking.

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¹ Although Defendants presented no obviousness case, the same hold true for this claim as well.

- 1 • The Jury has been asked to decide damages. Aside from the six-year
2 limitation on recovering damages, which is already reflected in the Jury
3 Instructions, the amount of damages does not depend on delay.

4 Defendants' arguments are improper. They are likely to mislead the Jury into
5 believing that they should consider how long it took for the Plaintiff to file suit in
6 determining infringement or calculating damages—factors entirely irrelevant to the
7 issues that the Jury has to decide. Plaintiff respectfully requests a corrective instruction
8 reminding the Jury to consider the disputes put before it on the merits, and that
9 Plaintiff's alleged delay in filing suit may not be considered by the Jury. Thus, Plaintiff
10 respectfully requests that the Court issue the following instruction:

11 Any alleged delay in Plaintiff's decision to file this lawsuit is
12 irrelevant to the issues that you have been asked to decide in this
13 lawsuit. Any issues regarding the Plaintiff's delay in filing suit are for
14 the Court to decide. You should determine the issues before you on
15 their merits based on the evidence that you have seen and heard.

16 Plaintiff requests that the foregoing instruction be read at an appropriate time and
17 manner when the Court reads its instructions to the Jury.

18 Dated: March 14, 2014

19 Respectfully submitted:

20 **BARNES & THORNBURG LLP**

21 By: /s/Todd G. Vare _____
22 TODD G. VARE
23 Attorneys for Plaintiff Creative Integrated
24 Systems, Inc.